Supreme Court, U.S.
FILED

110

No. 08-577 OCT 29 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM N. MARTIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

KENDRA M. MATTHEWS, OSB #965672
Counsel of Record for Petitioner Martin
JOHN S. RANSOM, OSB #742655
RANSOM BLACKMAN LLP
1001 S.W. Fifth Ave., Suite 1400
Portland, OR 97204
(503) 228-0487

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

In *United States v. Kordel*, 397 U.S. 1, 11-12 (1970), this Court held that the government could conduct overt, simultaneous civil and criminal proceedings without violating the Due Process Clause or otherwise departing from proper standards in the administration of justice. It cautioned, however, that dual agency activities conducted in other manners might run afoul of these principles.

In this case, a single investigation, pursued overtly by United States Securities and Exchange Commission as a civil inquiry, was in fact a collaborative effort with the FBI and the United States Attorney's Office designed to secure information for the civil inquiry and a criminal prosecution.

The questions presented by this case are:

1) Does the government violate the principles articulated in *Kordel* when it structures an investigation to create the false appearance that it is exclusively civil in nature for the purpose of securing the testimony and cooperation of targets of an anticipated criminal prosecution arising from the same events?

2) Does the government violate the Fourth and Fifth Amendments when it engages in "trickery and deceit" designed to keep persons subpoenaed to testify in an administrative

QUESTIONS PRESENTED FOR REVIEW – Continued

proceeding from discovering that they are targets of an anticipated criminal prosecution arising from the same events?

PARTIES TO THE PROCEEDING

This matter stems from a criminal case brought by the United States of America against Petitioner William N. Martin, J. Kenneth Stringer, III and J. Mark Samper in the United States District Court for the District of Oregon.

The United States of America was the Appellant before the Ninth Circuit Court of Appeals; Petitioner Martin, Mr. Stringer and Mr. Samper were the Appellees.

Each Appellee is filing a separate petition for a writ of certiorari before this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
UNITED STATES SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Procedural History	9
REASONS FOR GRANTING THE WRIT	13
A. The Ninth Circuit's Decision Dramatically Alters the Definition of Parallel Proceedings and, In So Doing, Eradicates the Due Process and Proper Administration of Justice Protections Articulated by this Court in *United States v. Kordel*, 397 U.S. 1 (1970)	15
B. The Proliferation of Cases Involving Civil and Criminal Proceedings Necessitates Clarification of *Kordel*'s "Special Circumstances."	24
CONCLUSION	32

TABLE OF CONTENTS – Continued

Page

APPENDIX:

United States v. Stringer, et al., 535 F.3d 929 (2008) ..... App. 1

United States v. Stringer, et al., 408 F.Supp.2d 1083 (2006) ..... App. 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Baxter v. Palmigiano, 425 U.S. 308 (1976).....29

Burger v. United States, 295 U.S. 78 (1935).....14

United States v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir. 1980).....17, 29

United States v. Kordel, 397 U.S. 1 (1970).....*passim*

United States v. Peters, 153 F.3d 445 (7th Cir. 1998).....23

United States v. Robson, 477 F.3d 13 (9th Cir. 1973).....23

United States v. Scrushy, 366 F.Supp.2d 1134 (N.D. Ala. 2005).....17

United States v. Stein, 541 F.3d 130 (2d Cir. 2008).....27

United States v. Stringer, et al., 408 F.Supp.2d 1083 (2006).....*passim*

United States v. Stringer, et al., 535 F.3d 929 (2008).....*passim*

United States v. Thayer, 214 F.Supp. 929 (D. Colo. 1963).....12, 19

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. Amdt. IV.....2, 12, 13, 24

U.S. Const. Amdt. V.....*passim*

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATIONS, RULES AND STATUTES

15 U.S.C. § 77t(b) 17

15 U.S.C. § 77u(d) 17

18 U.S.C. § 3231 9

28 U.S.C. § 1254(1) 1

17 C.F.R. § 203.6 28

17 C.F.R. § 203.7(a) 28

67 Fed. Reg. 46.091 (July 9, 2002) (Exec. Order No. 13271) 25, 27

F.R.Cr.P. 16 23

OTHER AUTHORITIES

Jody M. Arogeti, *How Much Cooperation Between Government Agencie Is Too Much?: Reconciling United States v. Scrushy, The Corporate Fraud Task Force, And The Nature Of Parallel Proceedings*, 23 Ga. St. U. L. Rev. 427 (2006) 25

David U. Gourevitch, *Between a Rock and a Hard Place: Parallel Proceedings in the Post-Enron Era*, 1383 PLI/Corp. 503 (2003) 29

Paul J. McNulty, Deputy Att'y Gen., U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) 28

TABLE OF AUTHORITIES – Continued

Page

John H. Sture, Alan E. Sorcher, *Parallel Proceedings: The Acquisition and Use of Information Regulator and Prosecutors*, 692 PLI/Corp. 479 (1990) 17

Larry D. Thompson, Deputy Att'y Gen., U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) 27

U.S. Attorneys' Manual 9-11.553 23

PETITION FOR A WRIT OF CERTIORARI

Petitioner William N. Martin respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 31, 2008.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is included in the Appendix beginning at App. 1 and is also available for review at *United States v. Stringer, et al.*, 535 F.3d 929 (2008) (*Stringer II*).

The district court's published Order dismissing the indictment returned against petitioner Martin, J. Kenneth Stringer, III and J. Mark Samper (collectively, defendants) and, in the alternative, suppressing evidence is included in the Appendix beginning at App. 30 and is also available for review at *United States v. Stringer, et al.*, 408 F.Supp.2d 1083 (2006) (*Stringer I*).

UNITED STATES SUPREME COURT JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). A panel of the Ninth Circuit issued its opinion on April 4, 2008. Each defendant filed a petition for rehearing en banc. The

petitions were denied. However, on July 31, 2008, the panel amended its opinion and entered judgment. App. 1. This petition is timely as it is filed within 90 days of the entry of that judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

A. Factual Background.

Petitioner Martin is the former head of sales of Flir Systems, Inc. ("FLIR"), a publicly traded Oregon corporation that sells infrared and heat-sensing cameras for military and industrial use. App. 6. Co-defendant J. Kenneth Stringer, III is FLIR's former CEO; co-defendant J. Mark Samper is its former CFO.

On June 8, 2000, based on information received from an employee and a former employee of FLIR, the United States Securities and Exchange Commission (SEC or Commission) began an investigation of FLIR's accounting practices and financial statements. App. 6. Within a few weeks, an Assistant United States Attorney with the United States Attorney's Office for the District of Oregon (USAO) met with SEC staff attorneys to discuss the investigation. App. 7. Following this meeting, the USAO requested that it and the Federal Bureau of Investigation (FBI) be given access to the SEC investigative files. App. 31. This request was granted.

In August 2000, an Assistant United States Attorney met with the SEC for a "preliminary discussion regarding the investigation." App. 32. In October 2000, the USAO and SEC met again for an extensive discussion of the investigation. *Id.* At that time, the SEC shared a memorandum outlining its assessment of the facts and the law, along with five notebooks of documents. *Id.* The USAO and SEC agreed that any

independent criminal investigation "would abate in order to continue receiving statements from defendants and other witnesses through the civil investigation." *Id.* An FBI agent at the meeting noted in a memorandum:

> It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time so as not to jeopardize the opportunity to obtain statements from these individuals.

Id.

Ten days after that meeting, the USAO submitted an internal funding request to the Department of Justice. That request informed the Department that the "Probability of prosecution is very high" and that the USAO would "benefit greatly" from the SEC's efforts. App. 32-33. The request identified "Martin, Stringer and Samper as potential targets." App. 33; App. 7-8.

After a visit to the FLIR facilities by SEC attorneys in January 2001, the SEC met with the FBI and USAO again to discuss the investigation. App. 33. "In that meeting, it was decided that criminal investigators would continue to allow the civil investigators to handle the investigation." *Id.* The FBI agent in attendance noted: "[The] AUSA * * * advised that based on the level of cooperation that the new FLIR management team has extended to the SEC, no overt

investigation will be conducted by the FBI at this time." *Id.*

As FLIR was cooperating, the USAO elected "not to pursue a parallel grand jury investigation" but to "passively observe[] the results of the SEC's work." App. 33. "[The AUSA] noted this strategy had 'provided good investigative results, at little cost to us' and that the 'SEC's investigation continues to suggest that this case will produce a criminal prosecution.'" *Id.* By this time, the government had identified Stringer, Samper, and Martin as the individuals responsible for any improper accounting and false financial statements by FLIR.

Throughout the ostensible civil investigation, the SEC regularly shared information and consulted with the USAO for guidance and strategic advice. App. 34. The USAO explained to an SEC attorney how to create the "best record possible" for a possible false testimony case, which the SEC attorney shared with "all testimony takers so that we will know and understand what [the USAO] needs/wants to prosecute a false testimony case." *Id.* Again at the direction of the USAO, the SEC deviated from its standard practice of conducting interviews and depositions at its office in Los Angeles and deposed Stringer, Samper and Martin in Oregon so that it would be the proper venue of any false statement case. *Id.*

In June 2001, the SEC and USAO explicitly discussed timing issues. They agreed that Stringer, Samper, Martin and FLIR would likely settle the SEC

matters if the USAO's involvement remained hidden, but surmised that if it were revealed, a stay of the SEC's investigation would be sought. *Id.* They therefore decided not to disclose the criminal proceeding at that time. *Id.* This tactical determination persisted: "In December 2001, the SEC and USAO decided it was still 'premature [for the USAO] to surface,' and that the presence of the USAO would 'impede' a scheduled meeting with FLIR." App. 35.

The SEC fully appreciated the value of keeping the involvement of the USAO hidden. App. 35. For instance, a note by one of its attorneys to herself reminded her to "make sure court reporters won't tell [FLIR's attorney] about [the AUSA]." App. 35. The SEC also explicitly asked the USAO to "stay away from SEC interviews because FLIR's attorney would be present." *Id.* The SEC also sought the assurance that USAO would "discuss" timing before "surfac[ing] to reveal its involvement. *Id.* Consistent with that request, the USAO and the SEC decided that the USAO would "surface end of Jan/early Feb [2003]" with "no notice." *Id.*

Stringer, Samper and Martin were subpoenaed to testify before the SEC. The notice advised each that "disclosure of information to the SEC is mandatory, subject to the valid assertion of any legal right or privilege." App. 35. "The subpoenas also stated that failure to provide information could result in a court order compelling such information followed by criminal sanctions." *Id.* The SEC also provided each with the SEC Form 1662. *Id.* This pre-printed form is

given to all witnesses subpoenaed by the SEC. This form, which is several pages long, includes information about the right to counsel, the Fifth Amendment, and the SEC's "routine uses" of information. The latter advised, *inter alia*, that "the SEC often makes its files available to other governmental agencies, particularly the USAO." App. 36. Form 1662 also notes that "any information given to the SEC may be used in any federal criminal proceeding." *Id.*

Stringer testified before the SEC on October 29, 2001. Neither he, nor his attorney, was aware that he was the target of a criminal investigation. At the beginning of his appearance, his counsel had the following exchange with SEC counsel:

> Stringer Counsel: My first question is whether Mr. Stringer is the target of any aspect of the investigation being conducted by the SEC.
>
> SEC Counsel: The SEC does not have targets in this investigation.
>
> Stringer Counsel: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.

SEC Counsel: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.

Stringer Counsel: And which U.S. Attorney's office might I inquire into?

SEC Counsel: That would be a matter up to your discretion.

App. 37. At the time, SEC counsel was well-aware that the Oregon USAO had already targeted Stringer, Samper, and Martin for criminal prosecution. Counsel was also aware that the SEC had been coordinating its investigation with the Oregon USAO since August 2000.

Following this exchange, Stringer, Samper and Martin each submitted to lengthy depositions by the SEC. Martin also made a "Wells Submission" to the Commission.

In September 2002, defendants were charged in a civil SEC complaint. Martin and Samper settled almost immediately; Stringer did not.

On September 17, 2003, Stringer, Samper, and Martin were indicted for conspiracy and fraud. Their statements to the SEC gave clear information about their defenses and formed a substantial part of the

evidence the government intended to use against them.

B. Procedural History.

As noted, in September 2003, the grand jury returned an indictment charging Stringer, Samper and Martin with conspiracy and fraud. App. 30. Jurisdiction and venue lay in the District of Oregon because the indictment alleged violations of federal offenses in Oregon. 18 U.S.C. § 3231. Based on the indictment, the SEC case against Stringer was stayed on motion of the government.

On March 21, 2005, each defendant filed a motion to dismiss the indictment or, alternatively, to suppress evidence, including their statements to the SEC, documents provided to the SEC, and Wells Submissions. Following eleven days of evidentiary hearings over several months, the district court granted defendants' motions to dismiss. Its extensive opinion (*United States v. Stringer, et al.*, 408 F.Supp.2d 1083 (2006) (*Stringer I*); App. 30) found that during its pre-indictment investigation, the government had abused the investigative process, violated defendants' due process rights and departed from the proper standards in the administration of justice as explained by this Court in *United States v. Kordel*, 397 U.S. 1 (1970). App. 39-40. It dismissed on the additional ground that the government had violated defendants' rights by engaging in trickery and deceit to obtain evidence defendants would not

have otherwise volunteered. *Id.* In the alternative, it suppressed evidence as derived from an improper investigation. *Id.*

The finding that formed the basis of the trial court's decision to dismiss was that the SEC and USAO proceedings "were not parallel":

> [T]hese were not parallel investigations. The USAO identified potential criminal liability and a few targets in the beginning of the investigation and elected to gather information through the SEC instead of conducting its own investigation. The government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked. * * * The government was aware that there was no parallel proceeding. * * *
>
> The delay by the USAO was not for the purpose of reviewing evidence gathered by the SEC to make an informed decision as to whether the case warranted prosecution. From the beginning, the USAO consistently held the position that a criminal prosecution was likely. * * * Moreover, the USAO was actively involved in the SEC investigation: meeting regularly, receiving documents, requesting interviews be conducted in Oregon to establish jurisdiction, advising what information was needed for a successful criminal prosecution, specifically instructing on

how best to conduct interviews to gather evidence for false statement cases, intentionally hiding its presence from FLIR's attorneys, and repeatedly planning with the SEC as to when it would be best to surface and conduct an overt criminal investigation.

The strategy to conceal the criminal investigation from defendants was an abuse of the investigative process. In *Kordel,* the Court found there was no abuse in using the civil discovery process to obtain evidence later used in a criminal proceeding because the case was not one in which the government "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution * * * nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." This case clearly falls within the scenario contemplated by the Supreme Court as a "violation of due process or a departure from proper standards in the administration of justice." *Kordel,* 397 U.S. at 11, 90 S. Ct. 763. In this case, the government did not advise defendants that it anticipated their criminal prosecution. Moreover, the USAO intentionally shielded its intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement.

Defendants had been identified consistently as "targets" or "subjects," and yet the government failed to alert them to the possibility of criminal exposure beyond presenting

> the standard form that is given to every individual, whether or not a target, prior to testifying. In light of the active role of the USAO in the SEC investigation, this warning was insufficient. *See, e.g., United States v. Thayer,* 214 F.Supp. 929, 933 (D. Colo. 1963) (noting that "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of the Government and did not receive an explanation of the true import of the [ ] inquiry").

App. 38-40.

The government appealed this dismissal to the Ninth Circuit. The amended opinion of the Ninth Circuit panel "accept[ed] the district court's findings under the clear error standard," but nonetheless reversed, based on its view that the government "was free" under the Constitution "not to conduct the criminal investigation openly":

> [W]e hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There

> is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

App. 5.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision fundamentally mischaracterizes the nature of the government's conduct in this case. The government was not pursuing parallel proceedings; it was conducting a single, unified, investigation designed to result in defendants' indictment and to maximize the likelihood of their convictions. This represented precisely the kind of conduct this Court, in *United States v. Kordel*, 397 U.S. 1 (1970), indicated would violate due process. The decision of the Ninth Circuit, if not corrected, will undermine the due process protection this Court intended to provide in *Kordel*.

The government's improper meshing of what should have been overt, dual investigations allowed it to obtain extensive testimony from defendants, privileged documents and a roadmap of defendants' defenses. The district court properly ruled that the government's conduct violated both the Fourth and

Fifth Amendments to the United States Constitution, constituted a departure from proper standards in the administration of justice and that suppression alone would not right the government's wrong.

A federal prosecutor has extensive investigative tools and "may strike hard blows, [but] he is not at liberty to strike foul ones." *Burger v. United States*, 295 U.S. 78, 88 (1935). When the USAO is permitted to not just receive information from a civil agency that would not otherwise be discoverable in a criminal prosecution, but actively tailor a civil investigation to its needs (while hiding its involvement), it goes too far. A civil agency should not serve as a stalking horse for criminal prosecutions. That is precisely what happened in this case.

There is great temptation and pressure on the government at this time to pursue allegations of corporate fraud. At such a time, it is important for this Court to re-emphasize that such pursuit must be conducted with due attention to the individual constitutional rights of those caught up in such investigations.

Because of its sharp departure from *Kordel* and the likelihood that the Ninth Circuit's decision will have a major impact on the many corporate fraud investigations likely to be pursued by the government in the near future, this Court should grant certiorari to correct that court's erroneous application of *Kordel*'s allowance of "parallel proceedings."

A. The Ninth Circuit's Decision Dramatically Alters the Definition of Parallel Proceedings and, In So Doing, Eradicates the Due Process and Proper Administration of Justice Protections Articulated by this Court in *United States v. Kordel*, 397 U.S. 1 (1970).

In *United States v. Kordel*, 397 U.S. 1, 3 (1970), this Court "granted certiorari to consider the questions raised by the government's invocation of simultaneous civil and criminal proceedings in the enforcement of federal law." There, the Food and Drug Administration had instituted investigative proceedings against a corporation. Thereafter, the defendants – officers of the corporation – were notified that there was a parallel grand jury investigation and that they were the targets of that investigation. After learning about the criminal investigation, civil interrogatories were served on the corporation. Knowing that the government was actively contemplating his criminal prosecution, one defendant elected to voluntarily answer interrogatories filed in the civil proceedings. *Id.* at 4. The defendants were subsequently indicted, tried and convicted. They appealed, challenging the government's use of the information gathered in the civil prosecution in the criminal case.

On review, this Court affirmed the convictions. It concluded that the defendants' claims that their Fifth Amendment rights had been violated were not credible given that – at the time the interrogatories were issued *and* answered – the defendants *knew* that the

government was actively contemplating their criminal prosecution. *Id.* at 8-9. On the record before it, the Court found no "violation of due process or a departure from proper standards in the administration of justice requiring the exercise of [the Court's] supervisory power." *Id.* at 11. The Court observed that there was nothing *per se* unconstitutional about parallel civil and criminal investigations and nothing unfair about the manner in which those parallel investigations had unfolded in the case before it. The Court cautioned, however, that its holding should not be construed as a ruling that there could never be circumstances in which such proceedings would violate a defendant's due process rights:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for a criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution, nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury, nor with any special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Kordel, 397 U.S. at 11-12 (emphasis added; footnotes omitted).

For over thirty-eight years, *Kordel* has stood for the proposition that the government can constitutionally engage in parallel civil and criminal proceedings so

long as it respects the due process rights of those targeted by the investigation. "Parallel proceedings are independent, contemporaneous civil enforcement and criminal proceedings involving substantially the same subject matter and parties." John H. Sture, Alan E. Sorcher, *Parallel Proceedings: The Acquisition and Use of Information Regulator and Prosecutors*, 692 PLI/Corp. 479 (1990); *see also*, *United States v. Scrushy*, 366 F.Supp.2d 1134, 1139 (N.D. Ala. 2005) ("To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect."). *Kordel* cautions courts to balance the government's interest in the efficient investigation of both civil and criminal matters against the rights of the people being investigated. *See, e.g.*, *United States v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980) (applying the principles of *Kordel* to a parallel SEC and USAO investigation). Petitioner's case presents a compelling issue because the Ninth Circuit's decision disregards *Kordel*'s "caution."

The Ninth Circuit's flawed reasoning is best illustrated by comparing it to that of the district court. The district court fully acknowledged the USAO's right to obtain information from the SEC while they each pursued *parallel* investigations. *See, e.g.*, 15 US.C. § 77t(b); 15 U.S.C. § 77u(d). After holding eleven days of hearings and reviewing all of the relevant evidence, however, it found that no such parallel investigation had occurred here. This was not a situation in which the SEC was unsure whether information would be passed on to the USAO, or even

a situation in which the SEC was aware of an ongoing parallel investigation but unsure of its status. It was one in which the government affirmatively hid the USAO's involvement from all outside parties, witnesses and counsel because it knew any hint of such involvement would have prompted defendants to, wisely, exercise their constitutional rights, thus, stopping the free flow of otherwise privileged information.

Rather than acknowledging the defendants' status as targets, as would have been required if it had subpoenaed them to the grand jury, SER 853-54,[1] or even simply revealing the USAO's active interest in the "SEC" investigation, the government simply issued defendants its standard SEC subpoena, along with Form 1662. The form was the same one issued to every other witness in the investigation. It proclaimed that the SEC *may* pass along information revealed to the USAO. As the SEC was already sharing its information with the prosecutor, who occasionally directed what information to gather and how to do so, the form itself presented a lie. Moreover, the SEC subpoena came with a cover letter offering the patently false assurance that the SEC had not come to any conclusion about wrongdoing or any individual's culpability. ER-1125; ER-1140; ER-1151-52.

---

[1] ER – refers to the Excerpts of Record submitted by the government to the Ninth Circuit; SER – refers to the Supplemental Excerpts of Record submitted by defendants.

Each defendant, armed with the standard disclosure forms, an awareness that real, immediate penalties came from a decision not to cooperate, and a false assurance that there was not already a civil, let alone a criminal, target on his back, weighed his right to remain silent against the risk articulated in the form that the SEC *may* share the evidence he produced with the USAO in the future. Each defendant's balancing tilted in favor of cooperation. The government's realistic prediction that, under the circumstances, Form 1662 alone would not tilt the defendants' balancing against cooperation was fully realized. Given petitioner Martin's testimony, *see, e.g.*, SER-155-56, his counsels' testimony, *see, e.g.*, ER-1240; SER-217, the government's intentional effort to keep the USAO's involvement hidden, *see, e.g.*, SER-1118, and the district court's findings, it is indisputable that the scale would have tilted against such cooperation had even a hint of the USAO's involvement been leaked.

Considering the totality of the circumstances summarized above, the district court found:

> Defendants had been identified consistently as "targets" or "subjects," and yet the government failed to alert them to the possibility of criminal exposure beyond presenting the standard form that is given to every individual, whether or not a target, prior to testifying. In light of the active role of the USAO in the SEC investigation, [the SEC Form 1662] was insufficient. *See, e.g., United States v. Thayer,* 214 F.Supp. 929, 933 (D.

> Colo. 1963) (noting that "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of the Government and did not receive an explanation of the true import of the [ ] inquiry").

App. 40.

The district court's ruling was far from a holding that the SEC Form 1662 is inadequate notice that information shared with the SEC *may* be shared with other agencies in a routine case. Instead, the court ruled that, in the unique circumstances of this case, the Form 1662 was inadequate and that the concerted effort by the USAO and SEC to keep the USAO's involvement hidden violated defendants' constitutional rights and constituted a departure from proper standards in the administration of justice.

Endorsing the district court's application of *Kordel* would in no way impair the government's ability to properly share information or otherwise engage in legitimate parallel proceedings. It would simply assure that the government would respect the constitutional rights of the individuals being investigated. The remarkable aspect of this case is not the district court's ruling, but the government's conduct.

The same cannot be said of the Ninth Circuit's analysis. Substituting form over substance, that court accepted the district court's findings, but rejected their natural consequences. Focusing on the content

of a pre-printed, standard form rather than the actual information communicated to and withheld from Stringer, Samper, Martin and their attorneys, the Ninth Circuit found "no deceit" because the government "is free" "not to conduct [a] criminal investigation openly." App. 5. That is precisely what *Kordel* says the government is not free to do in the context of dual investigations. In this case, the government not only "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution," *Kordel*, 397 U.S. at 11-12, but engaged in affirmative dissembling to thwart efforts that would have revealed that involvement.

This constitutes a dramatic shift from *Kordel*. Prior to *Stringer II*, courts and governmental agencies understood that parallel proceedings were – as the name implies – two separate, independent proceedings. After *Stringer II*, "parallel" or "simultaneous" investigations have been redefined to simply mean two agenda (SEC: civil; USAO: criminal). Even if there is only one investigation, as long as there are two purposes, there are parallel proceedings.[2]

---

[2] To verify that the Ninth Circuit's conclusion dramatically alters the traditional understanding of parallel proceedings or investigations, one need look no further than the government's testimony in this case. AUSA Robinson testified that, in any parallel proceeding, the USAO must ensure that the civil investigative entity "maintain[s its] independence," adding that the prosecutors cannot direct the activities of such an agency. ER-561. The district court rejected the government's assertion that the SEC had maintained its independence here and the

(Continued on following page)

Prior to *Stringer II*, *Kordel* contained a litany of possible improprieties a court must watch for when evaluating parallel investigations, including situations in which:

> (1) the government pursues a civil action "solely to obtain evidence for a criminal prosecution";
>
> (2) the government fails "to advise the defendant in the civil proceeding that it contemplates his criminal prosecution";
>
> (3) the "defendant is without counsel";
>
> (4) the defendant "reasonably fears prejudice from pretrial publicity or other unfair injury"; or
>
> (5) "any special circumstances that might suggest the unconstitutionality or even the impropriety of" a criminal prosecution is present.

Kordel, 397 U.S. at 11-12. After *Stringer II*, *Kordel*'s protections apply only when the *sole* purpose of a civil agency's investigation is a pretext to a criminal investigation. App. 20. If there is a legitimate civil interest supporting the joint-purpose investigation, there is no due process concern, regardless of the conduct of the government as a whole. App. 22; *see*

Ninth Circuit accepted that finding. Nevertheless, it concluded that there were parallel investigations. That conclusion is inexplicable under *Kordel*.

also F.R.Cr.P. 16. So long as there is a civil right that might also be vindicated, the USAO is free to direct a civil investigation to its advantage in a criminal prosecution.

Additionally, following *Stringer II*, so long as a general notice advising that agencies *might* share information in the future is provided, the USAO is free to lurk in the background of the ostensibly civil investigation to secure the testimony of a criminal target without notifying him of his status as such. This is something it unquestionably could not do if the USAO's role in an investigation was known. *See* SER-853-54; *see also* U.S. Attorneys' Manual 9-11.553.

Finally, all of the rulings discussed above created a situation in which the Ninth Circuit could dismiss (and did) the proposition articulated in *Kordel*, and relied upon by the district court here, that dismissal (and/or suppression) is appropriate when the government, while conducting a multi-agency investigation, departs "'from the proper standards in the administration of justice.'" App. 40. Likewise, those rulings prevented any meaningful consideration of the district court's ruling that the government had improperly obtained evidence through trickery or deceit in violation of both the Fourth and Fifth Amendments. *See United States v. Robson*, 477 F.3d 13, 18 (9th Cir. 1973) (government cannot affirmatively mislead subject of parallel investigations that the investigation is purely civil in an effort to secure consent to a search or seizure); *see also United States v. Peters*,

153 F.3d 445, 451 (7th Cir. 1998) ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation."). App. 40-43. The continued viability of all of these principles is squarely presented by this case and should be addressed by this Court.

The Ninth Circuit's decision will have a dramatic impact on multi-agency investigations in the future. It has sanctioned the incorporation of the "cloak and dagger" activities of an undercover sting operation into the everyday operation of a civil agency's investigation. This is *precisely* the conduct about which *Kordel* cautioned. The notion that the government must fight fairly when investigating putative criminal defendants is of exceptional importance. The Ninth Circuit's cavalier disregard of that notion presents a compelling issue that this Court must grant certiorari to address.

B. The Proliferation of Cases Involving Civil and Criminal Proceedings Necessitates Clarification of *Kordel*'s "Special Circumstances."

Everything about today's current political and economic climate suggests that there will be a proliferation of cases similar to defendants' in the coming years. The government has been expressly focused on investigating and prosecuting the type of offenses that typically have a civil agency counterpart since at

least 2002. At that time, President George W. Bush announced a "Ten-Point Plan to Improve Corporate Responsibility and Protect America's Shareholders."[3] As a part of that plan, President Bush created the Corporate Task Force. Exec. Order No. 13271, 67 Fed. Reg. 46.091 (July 9, 2002)). "The Executive Order is intended to improve internal management of the federal government by encouraging agencies to work together to fight perpetrators of financial crimes." Arogeti, 23 Ga. Sta. U. L. Rev. at 428 citing Exec. Order No. 13271, 67 Fed. Reg. 46.091 (July 9, 2002)). Under the Corporate Task Force, the Department of Justice (DOJ) works with the SEC, the Commodities Future Trading Commission, the Federal Energy Regulatory Commission, and the Federal Communications Commission to investigate and prosecute significant financial crimes involving corporate fraud. The Executive Order provides, *inter alia*:

> **Section 3.** *Functions.* Consistent with the constitutional authority of the President, the authorities assigned to the Attorney General by law, and other applicable law, the Task Force shall:
>
> (a) provide direction for the investigation and prosecution of cases of securities

---

[3] Jody M. Arogeti, *How Much Cooperation Between Government Agencies Is Too Much?: Reconciling United States v. Scrushy, The Corporate Fraud Task Force, And The Nature Of Parallel Proceedings*, 23 Ga. St. U. L. Rev. 427 (2006) (citing The President's Leadership in Combating Corporate Fraud, www.whitehouse.gov/infocus/corporateresponsibility).

fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses, and other related financial crimes committed by commercial entities and directors, officers, professional advisers, and employees thereof (hereinafter "financial crimes"), when such cases are determined by the Deputy Attorney General, for purposes of this order, to be significant;

(b) provide recommendations to the Attorney General for allocation and reallocation of resources of the Department of Justice for investigation and prosecution of significant financial crimes, recovery of proceeds from such crimes to the extent permitted by law, and other matters determined by the Task Force from time to time to be of the highest priority in the investigation and prosecution of such crimes; and

(c) make recommendations to the President, through the Attorney General, from time to time for:

(i) *action to enhance cooperation among departments, agencies, and entities of the Federal Government in the investigation and prosecution of significant financial crimes;*

(ii) *action to enhance cooperation among Federal, State, and local authorities responsible for the investigation and*

> *prosecution of significant financial crimes*[.]

Exec. Order 13271, 67 Fed. Reg. 46.091-2 (July 9, 2002) (emphasis added).

In addition to the heightened focus on investigating corporate fraud, the government has also developed a strategy to ensure the quick and ready cooperation of the corporate entities it investigates:

> In January 2003 then-United States Deputy Attorney General Larry D. Thompson promulgated a policy statement, *Principles of Federal Prosecution of Business Organizations* (the "Thompson Memorandum"), which articulated "principles" to govern the Department's discretion in bringing prosecutions against business organizations. * * * Along with the familiar factors governing charging decisions, the Thompson Memorandum identifies nine additional considerations, including the company's "*timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.*" Mem. from Larry D. Thompson, Deputy Att'y Gen., U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), at II.

United States v. Stein, 541 F.3d 130, 136 (2d Cir. 2008). While the Thompson Memorandum has been replaced by the McNulty Memorandum, which in turn has been amended, a consistent principle is that a "corporation's timely and voluntary disclosure of

wrongdoing and its cooperation with the government's investigation may be relevant factors" in determining whether to charge a corporation criminally. Mem. from Paul J. McNulty, Deputy Att'y Gen., U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), at VII. Consequently, corporations are loathe not to cooperate fully when learning about a government investigation.

Given the current economic climate, one must assume that the pressure on the government to efficiently and effectively investigate allegations of corporate fraud will only intensify over the next decade. Moreover, corporate cooperation with any such investigations may not be simply a sound business decision but, in fact, something the corporation has already agreed to provide as a part of an earlier government "bailout."

The perils faced by an individual subject to a civil investigation in the climate described above are numerous. The most obvious difficulty is deciding whether to invoke one's Fifth Amendment right against self-incrimination. As the SEC does not provide copies of documents in advance of its questioning of a witness,[4] the decision about whether to invoke must, in most cases, be made based on the witness' recollection

---

[4] Upon request, the SEC will provide a witness the right to inspect the Formal Order of Investigation, which may shed some light on the purpose of the sworn interview, and a copy of the witness' documentary evidence, if it is non-public information. 17 C.F.R. §§ 203.7(a) and 203.6, respectively.

of "the facts." Even with legal advice, such recollection may not suggest whether there is any potential criminal liability as "the line between regulatory and criminal conduct is hazy and evolving." David U. Gourevitch, *Between a Rock and a Hard Place: Parallel Proceedings in the Post-Enron Era*, 1383 PLI/Corp. 503, 507 (2003). If the witness does invoke, he risks the civil tribunal drawing an adverse inference against him, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), along with other less direct – but no less serious – consequences, *e.g.*, torpedoing settlement negotiations with the SEC or losing his job. If he does not invoke, he risks his statements being forwarded to the USAO for use in a criminal prosecution.

The witness faces the same conundrum when he is asked to respond to a request for the production of documents through a subpoena *duces tecum* or in deciding whether to make a "Wells Submission" (a written statement addressing the legal and policy issues supporting the argument that the SEC should decline to initiate an enforcement action).

Despite those difficulties, the question presented here is not whether the SEC and the USAO may engage in a true parallel investigation, legitimately placing an individual in the difficult situation described above. In *Kordel*, this Court ruled that – so long as the government otherwise acts fairly – there is nothing inherently unconstitutional about placing a person in that unenviable position. *See also*, *United States v. Dresser Indus., Inc.*, 628 F.2d 1368, 1370 (D.C. Cir. 1980) ("[e]ffective enforcement of the securities

laws require that the SEC and Justice be able to investigate possible violations simultaneously).

The question is how far the government can manipulate the situation to its advantage while still acting fairly; that is, while still acting in a manner consistent with due process and the proper administration of justice. Here, the SEC and USAO engaged in a single (not parallel) investigation in which the criminal aspect of it was carefully, and intentionally, concealed. The USAO kept the FBI from investigating or the grand jury from issuing subpoenas precisely so defendants would not discover that the USAO was actively contemplating their criminal prosecution. The SEC was careful to give only the standard warning given to every witness for precisely the same reason. In a very deliberate fashion, the government hid the true nature of its investigation to influence the targets' decision-making.

The district court properly recognized that the government's conduct went too far. That the only purpose for its conduct was to undermine defendants' constitutional rights is a matter of historical fact. App. 38 ("the government was concerned that the presence of a criminal investigation" would prompt witnesses "to invoke their constitutional rights"). Moreover, in the age of corporate cooperation, there can be no other justification for concealing such an investigation because such cooperation makes documents and other relevant corporate information

readily available and alleviates any concern about continuing fraudulent activity.[5] The loss of the ability to unfairly manipulate a criminal target's decision about whether to invoke his constitutional rights cannot be a legitimate basis to permit a civil agency to serve as a stalking horse for the USAO.

Here, the government's ruse was a success. Each defendant provided documents which were in their personal possession pursuant to a subpoena *duces tecum*, each submitted to questioning and petitioner presented a Wells Submission, detailing his defense to the allegations. None would have done so had the government not engaged in a deliberate effort to keep the USAO's involvement concealed. The Ninth Circuit concluded, "There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make." App. 5. That decision stands in stark contrast to this Court's statement in *Kordel* that the government should not conceal in a civil investigation that it "contemplates his criminal prosecution." *Kordel*, 397 U.S. at 12. It fundamentally alters the government's obligations in these circumstances at a time when these rights must be carefully

[5] With FLIR, for instance, the officers were fired and a new Board of Directors was installed to eliminate alleged problems at the company as identified by the SEC enforcement personnel. The company was neither prosecuted nor fined.

observed. For that reason, this Court should grant certiorari.[6]

CONCLUSION

In the intensifying race to uncover and prosecute corporate fraud, the courts must be ever vigilant to ensure that the constitutional rights of those targeted for criminal prosecution are not trampled. The district court assumed that responsibility. The Ninth Circuit abdicated it. Given the proliferation of cases sure to flow from these types of investigations in the near future, the Ninth Circuit's decision cannot stand unreviewed by this Court.

For the foregoing reasons, this Court should grant this petition, as well as that of co-defendants

---

[6] That the Ninth Circuit's decision dramatically altered the rules for "parallel" investigations of corporations and their officers is also demonstrated by the fact that after the Ninth Circuit panel issued its initial opinion sanctioning the single, dual purpose investigation that occurred here, the Chamber of Commerce of the United States of America, which "includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country," and the Association of Corporate Counsel, which is the bar association of "in-house counsel and represents almost 24,000 in-house counsel members in over 80 countries," filed an amicus brief recommending that the Ninth Circuit hear the matter en banc and reinstate the district court opinion. 5/28/08 letter of *amicus curiae* to Ninth Circuit from the Chamber and ACC.

Stringer and Samper, and consolidate these matters for argument.

Dated this 29th day of October, 2008.

KENDRA M. MATTHEWS, OSB #965672
Counsel of Record for Petitioner Martin
JOHN S. RANSOM, OSB #742655
RANSOM BLACKMAN LLP
1001 S.W. Fifth Ave., Suite 1400
Portland, OR 97204
(503) 228-0487

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. J. KENNETH STRINGER, III; J. MARK SAMPER; WILLIAM N. MARTIN, *Defendants-Appellees.*	No. 06-30100 D.C. No. CR-03-00432-ALH ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
September 26, 2007 – Portland, Oregon

Filed April 4, 2008
Amended July 31, 2008

Before: Mary M. Schroeder, Barry G. Silverman and Jay S. Bybee, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Karin J. Immergut, United States Attorney; Hannah Horsley, Assistant United States Attorney; and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant United States of America.

Janet Lee Hoffman, Hoffman Angeli LLP, Portland, Oregon, for defendant-appellee J. Kenneth Stringer, III.

Ronald H. Hoevet, Hoevet, Boise & Olson, P.C., Portland, Oregon, for defendant-appellee Mark Samper.

John S. Ransom and Kendra Matthews, Ransom Blackman LLP, Portland, Oregon, for defendant-appellee William Martin.

ORDER

The opinion in this matter filed on April 4, 2008, and published at *United States v. Stringer,* 521 F.3d 1189 (9th Cir. 2008), is amended as follows:

On slip op. 3549, replace the listed counsel, lines 3-10, with the following:

> Karin J. Immergut, United States Attorney; Hannah Horsley, Assistant United States Attorney; and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant United States of America.
>
> Janet Lee Hoffman, Hoffman Angeli LLP, Portland, Oregon, for defendant-appellee J. Kenneth Stringer, III.
>
> Ronald H. Hoevet, Hoevet, Boise & Olson, P.C., Portland, Oregon, for defendant-appellee Mark Samper.

John S. Ransom and Kendra Matthews, Ransom Blackman LLP, Portland, Oregon, for defendant-appellee William Martin.

On slip op. 3550, replace the first full paragraph with the following:

> Accepting the district court's factual findings under the clear error standard, we hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

On slip op. 3556, replace the last sentence of the second paragraph with the following:

> Rosenbaum represented Meussle, as well as Samper and FLIR.

On slip op. 3559, replace the citation sentence in the first partial paragraph with the following:

> *See, e.g., United States v. Carriles,* 48[illegible] F. Supp. 2d 599, 615, 619 (W.D. Tex. 2007), *appeal pending,* No. 07-50737 (5th Cir.); *United States v. Rand,* 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

On slip op. 3568, insert the following as the first full paragraph:

> The panel shall retain jurisdiction over any subsequent appeal in this matter.

Defendant-Appellee Martin's Petition for Rehearing En Banc, Defendant-Appellee Stringer's Petition for Rehearing and Suggestion for Rehearing En Banc, and Defendant-Appellee Samper's Petition for Rehearing En Banc are denied. No subsequent petition for rehearing or rehearing en banc may be filed.

OPINION

SCHROEDER, Circuit Judge:

I. Introduction

The United States appeals from a final order of the district court dismissing criminal indictments against three individual defendants charging counts of criminal securities violations. The dismissal was premised on the district court's conclusion that the government had engaged in deceitful conduct, in

violation of defendants' due process rights, by simultaneously pursuing civil and criminal investigations of defendants' alleged falsification of the financial records of their high-tech camera sales company. Foreseeing the possibility of an appeal, the district court held that the indictments must be dismissed, but ruled in the alternative that, should there be a criminal trial, all evidence provided by the individual defendants in response to Securities and Exchange Commission ("SEC") subpoenas should be suppressed. *See United States v. Stringer,* 408 F. Supp. 2d 1083 (D. Or. 2006).

The court also suppressed evidence relating to the "Swedish Drop Shipment," an allegedly fraudulent accounting entry. The district court reasoned that the government had improperly interfered with, or intruded into, the attorney-client relationship of one of the defendants by accepting incriminating evidence about the entry from a defense attorney. The attorney had an apparent conflict of interest because she represented the corporation as well as an individual defendant.

Accepting the district court's factual findings under the clear error standard, we hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal

proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

We also reverse the order excluding evidence received from the conflicted attorney. We do so because the government advised the attorney of the existence of a potential conflict and did not interfere with the attorney-client relationship.

II. Background

A. The concurrent SEC civil and U.S. Attorney criminal investigations

Prior to the criminal action that forms the basis of this appeal, the SEC began investigating the defendants, J. Kenneth Stringer, III, J. Mark Samper, and William N. Martin, and their company for possible civil securities fraud violations. The company was FLIR Systems, Inc. ("FLIR"), an Oregon corporation headquartered in Portland that sells infrared and heat-sensing cameras for military and industrial use. The SEC began the investigation on June 8, 2000. About two weeks later, the SEC held the first of a

series of meetings with the Oregon United States Attorney's Office ("USAO") to coordinate the ongoing SEC investigation with a possible criminal investigation. An SEC Assistant Director and an SEC Staff Attorney met with the supervisor of the white collar crime section of the USAO to discuss the possibility of opening a criminal investigation. The meeting apparently convinced the USAO supervisor to investigate. Within days, the USAO and the Federal Bureau of Investigation ("FBI") opened a criminal investigation.

Federal securities laws authorize the SEC to transmit evidence it has gathered to the USAO to facilitate a criminal investigation by the USAO. *See* 15 U.S.C. §§ 77t(b), 78u(d). To gather evidence for its criminal investigation, the Oregon USAO in June of 2000 sent a letter to the SEC (the "Access Letter") requesting access to the SEC's non-public investigative files, and the SEC promptly granted access.

The civil and criminal investigations proceeded in tandem and the SEC continued to meet and communicate with the USAO and FBI. The SEC turned over documents the SEC collected through its civil investigation.

At the beginning of the criminal investigation, the USAO identified two of the three defendants, FLIR's former CEO, Stringer, and former CFO, Samper, as possible targets, and named them in the USAO's Access Letter to the SEC. A few months later, in October 2000, the Assistant United States Attorney ("AUSA") assigned to the case made a list of the

subjects of the investigation and placed asterisks and the comment "knew what [was] going on" next to the entries for Samper and Stringer. A month later, the AUSA stated in his handwritten notes that Stringer had "lied [about] his role in" the company. In April 2001, an e-mail from the SEC Staff Attorney to the SEC Assistant Director stated the AUSA "define[d] [the] targets as Ken Stringer and Mark Samper."

The district court concluded that the third defendant, Martin, former VP of Sales, was also an early potential target of the criminal investigation. Martin appears on the AUSA's early list of the subjects of the investigation above the comment "knew pushing up sales." During a January 2001 meeting, the SEC advised the USAO and FBI that FLIR was blaming Stringer and Martin for the fraudulent conduct at the heart of the investigation.

Early in the criminal investigation, the USAO decided the investigation should remain confidential. At an October 2000 meeting between the SEC, USAO, and FBI, the AUSA advised that the evidence collected by the SEC might support criminal wire fraud charges. Nonetheless, an internal FBI memo issued in late October stated that the AUSA had concluded, based on the defendants' cooperation with the SEC at that point, that the SEC should investigate "without the assistance or inclusion of the FBI." At the January 2001 meeting between the SEC, FBI, and USAO, the SEC revealed that FLIR was cooperative and was providing evidence that was damaging to Stringer and Martin.

By June 2001, the USAO was not yet ready to convene a grand jury and issue indictments. The SEC and USAO believed that FLIR and defendant Samper would settle with the SEC so long as the U.S. Attorney was not directly involved. During a December 2001 phone conversation between the AUSA assigned to the case and the SEC Assistant Director, the AUSA continued to believe it was "premature [sic] to surface" and that the presence of an AUSA would "impede" a meeting between the SEC and defendants. During a December 2002 phone call, the SEC and USAO decided that the USAO would not "surface", i.e., convene a grand jury and issue indictments, until the "end of Jan/early Feb" 2003.

The SEC facilitated the criminal investigation in a number of ways. The SEC offered to conduct the interviews of defendants so as to create "the best record possible" in support of "false statement cases" against them, and the AUSA instructed the SEC Staff Attorney on how best to do that. The AUSA asked the relevant SEC office, located in Los Angeles, to take the depositions in Oregon so that the Portland Office of the USAO would have venue over any false statements case that might arise from the depositions, and the SEC did so. Both the SEC and USAO wanted the existence of the criminal investigation kept confidential. The SEC Staff Attorney, at one of the Portland depositions, made a note that she wanted to "make sure [the] court reporters won't tell [FLIR's Attorney]" that there was an AUSA assigned to the case.

The SEC, however, did not hide from the defendants the possibility – even likelihood – of such an investigation. The SEC sent each of the defendants subpoenas in the summer of 2001, and attached to each was Form 1662, a form sent to all witnesses subpoenaed to testify before the SEC. Under the header "Routine Uses of Information," the four-page form states that "[t]he Commission often makes its files available to other governmental agencies, particularly the United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate."

Form 1662 also advises witnesses of their Fifth Amendment rights. After the heading "Fifth Amendment and Voluntary Testimony," the form states that:

> Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission of any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment of the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty, or forfeiture.

None of the defendants invoked his right against self-incrimination during his deposition, and all proceeded to testify in compliance with the subpoena. Each of the defendants was represented by counsel when he testified.

During the course of Stringer's deposition, taken in Portland in October 2001, Stringer's attorney actually questioned the SEC Staff Attorney about the involvement of the USAO. In response to those questions, the SEC Staff Attorney answered as follows:

> MR. MARTSON: My first question is whether Mr. Stringer is a target of any aspect of the investigation being conducted by the SEC.
>
> STAFF ATTORNEY: The SEC does not have targets in this investigation.
>
> MR. MARTSON: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.
>
> STAFF ATTORNEY: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.
>
> MR. MARTSON: And which U.S. Attorney's Office might I inquire into?
>
> STAFF ATTORNEY: That would be a matter up to your discretion.

The record does not show the SEC did anything to impede an inquiry, nor does it disclose that any

inquiry was made. The record reflects that the government never furnished defendants with any false information concerning the existence of a criminal investigation.

In September 2002, a year before the criminal indictments, defendants Samper and Martin entered into consent decrees in the civil action, agreeing to pay penalties, disgorgement, and pre-judgment interest.

B. The "Swedish Drop Shipment" evidence from the attorney jointly representing defendants

Throughout the course of the SEC investigation, FLIR was represented by attorney Lois Rosenbaum. Defendant Samper, FLIR's former CFO, had retained separate counsel. In March 2000, Rosenbaum sent Samper a letter offering to jointly represent FLIR, Stringer, and Samper. In the letter, Rosenbaum claimed that based on her "present knowledge of the facts," she did not anticipate that any conflicts would arise between the co-clients. The letter, however, advised the clients to consult separate counsel before consenting to the joint representation and promised immediately to inform the clients if a conflict did arise.

Samper's separate counsel sent a letter to Rosenbaum stating that Samper consented to the "joint representation in spite of the potential conflict of interest that may arise between the clients." Samper's

separate counsel continued to represent him as monitoring counsel.

On June 30, 2000, the SEC sent Samper a subpoena with Form 1662 enclosed. It warned of possible dangers of joint representation. The form advised that "[y]ou may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's."

In July 2000, when the SEC learned that Rosenbaum was representing FLIR and its employees, it immediately sent her a letter warning of the specific dangers of this co-representation. "We are concerned that the broad range of interests possessed by your many clients cannot be adequately represented by a single attorney." The letter specifically pointed out the potential conflict of interest in representing a company under investigation by the SEC and upper level management who may have civil liability. The letter stated that, "Although it is far too early in the investigation for the SEC staff to identify people who may possess liability, we are troubled by the scope and breadth of your representation." Rosenbaum continued to represent both FLIR and Samper, among others.

One of the eventual charges in the indictment was that two of the involved defendants created the "Swedish Drop Shipment," an entry in FLIR's books

that allegedly recognizes $4.6 million in revenue without substantiation. FLIR's Controller, David Meussle, first discovered the unsubstantiated entry. Meussle believed that Stringer and Samper made the entry. Rosenbaum represented Meussle, as well as Samper and FLIR.

The SEC civil complaint, filed on September 30, 2002, two years after the joint representation began, did not allege a charge relating to the "Swedish Drop Shipment." After Rosenbaum received a copy of the complaint, she called the SEC Staff Attorney, disclosed the existence of the "Swedish Drop Shipment," and facilitated SEC interviews with Meussle in order to enhance the level of FLIR's cooperation with the government. Rosenbaum also sent a memo to the SEC that contained possibly privileged communications she had with Samper about the transaction. The criminal indictment later charged that Stringer and Samper created the false entry. Thus Rosenbaum, while representing Meussle and FLIR, apparently in order to further the interests of FLIR, assisted the SEC's investigation.

C. Proceedings Below

On September 17, 2003, a grand jury returned an indictment charging Stringer, Samper, and Martin with securities, mail, and wire fraud. Defendants filed motions to dismiss the indictments and to suppress statements they made to the SEC. The district court dismissed the indictments and suppressed the

SEC statements because it concluded that the government, in violation of the due process clause, abused its authority to conduct parallel proceedings. *United States v. Stringer,* 408 F. Supp. 2d 1083, 1088-89 (D. Or. 2006). The district court held that the government violated defendants' Fifth Amendment due process rights by using trickery and deceit to conceal the criminal investigation from defendants, *id.* at 1080, and conducting a criminal investigation under the auspices of a civil investigation, *id.* at 1089. The district court suppressed evidence of the "Swedish Drop Shipment" on the basis of its conclusion that the government interfered with Samper's attorney-client relationship in violation of his due process rights. *Id.* at 1091-92.

This appeal by the government followed. This court has jurisdiction pursuant to 18 U.S.C. § 3731.7

III. Discussion

A. The parallel investigations

The Supreme Court has held that the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith. *See United States v. Kordel,* 397 U.S. 1, 11 (1970). In *Kordel,* the Supreme Court held that the government did not violate the due process rights of corporate executives when it used evidence it obtained from an FDA civil investigation to convict them of criminal misbranding. 397 U.S. at 11. The Court explained that the FDA did not

act in bad faith when it made a request for information, which ultimately was used in the criminal investigation, for the agency made similar requests as a matter of course in 75% of its civil investigations. *Id.* at 6. The Court suggested that the government may act in bad faith if it brings a civil action solely for the purpose of obtaining evidence in a criminal prosecution and does not advise the defendant of the planned use of evidence in a criminal proceeding. *Id.* at 12-13. The Court thus distinguished the *Kordel* investigation from bad faith cases where

> the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; . . . [or] any other special circumstances . . . might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. at 12-13.

The Supreme Court has not had occasion to address such issues since *Kordel,* but lower courts have. In *SEC v. Dresser Industries, Inc.,* the D.C. Circuit applied the principles laid down in *Kordel* to a case involving parallel SEC civil and Department of Justice criminal investigations. *See* 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) (en banc). The court emphatically upheld the propriety of such parallel investigations. "Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously." *Id.* at

1377. The court said it would refuse to bar such investigations absent unusual circumstances. *Id.* It said courts should refuse to "block parallel investigations by these agencies in the absence of 'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government." *Id.*

District courts have occasionally suppressed evidence or dismissed indictments on due process grounds where the government made affirmative misrepresentations or conducted a civil investigation solely for purposes of advancing a criminal case. *See, e.g., United States v. Carriles,* 486 F. Supp. 2d 599, 615, 619 (W.D. Tex. 2007), *appeal pending,* No. 07-50737 (5th Cir.); *United States v. Rand,* 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

In this case, the district court concluded that the government should have told defendants of the criminal investigation and that it violated the standards laid down in *Kordel* when it failed to "advise defendants that it anticipated their criminal prosecution." *Stringer,* 408 F. Supp. 2d at 1088. It held that the government engaged in "trickery and deceit" when the SEC staff attorney instructed court reporters to refrain from mentioning the AUSA's involvement. When the SEC staff attorney responded to Stringer's attorney's question, during Stringer's deposition, by directing him to the U.S. Attorney, the district court concluded that the SEC attorney "evaded the question." *Id.* at 1089.

In its appeal, the government argues that it had no legal duty to make any further disclosure of the existence of the pending criminal investigation. It points to the warnings in Form 1662 in which the government disclosed the possibility of criminal prosecution, and it stresses that it did not make any affirmative misrepresentations. It maintains the SEC attorney's answer was appropriate and truthful.

The defendants argue that the district court properly held that the use of the evidence obtained by the SEC in a criminal prosecution would violate defendants' Fifth Amendment privilege against self-incrimination. The defendants were advised that the evidence could be used in a criminal investigation, but defendants did not invoke their Fifth Amendment privilege during the SEC investigation. The government on appeal correctly contends that defendants waived or forfeited their Fifth Amendment right against self-incrimination.

The privilege against self-incrimination protects an individual from being forced to provide information that might establish a direct link in a chain of evidence leading to his conviction. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). It may be waived if it is not affirmatively invoked. In *Minnesota v. Murphy*, the Supreme Court stressed that the privilege is lost if not affirmatively invoked, even if the defendant did not make a knowing and intelligent waiver. 465 U.S. 420, 428 (1984). We have similarly stated that a "defendant's failure to invoke the privilege against self-incrimination waives a later claim of privilege."

Unruh, 855 F.2d at 1374 (holding that a defendant waived the privilege when, after being advised of his right not to answer questions, he proceeded to testify in a civil deposition).

The district court therefore erred in holding that defendants' waivers of the privilege were ineffective because they were not told of the U.S. Attorney's active involvement. *See Stringer,* 408 F. Supp. 2d at 1089-90. The SEC Form 1662 used in this case alerts SEC investigative witnesses that the information can be used in a criminal proceeding. Defendants were on sufficient notice, and so were their attorneys. As one federal court has explained, all that was required was "sufficient notice . . . that any information could be used against [them] in a subsequent criminal proceeding." *United States v. Teyibo,* 877 F. Supp. 846, 855 (S.D.N.Y. 1995). That court emphasized that "SEC Form 1662 stated in no uncertain terms that the [g]overnment's request for information could be refused pursuant to the Fifth Amendment's protection against compelled self-incrimination." *Id.* We agree.

The SEC here went even further, warning each defendant at the beginning of each deposition that "the facts developed in this investigation might constitute violations of . . . criminal laws." Nonetheless, defendants proceeded to testify and failed to invoke their privilege against self-incrimination. Defendants have forfeited any claims that the use of their testimony against them in the criminal proceedings violates the privilege against self-incrimination.

The defendants next contend that the district court properly concluded that the government used the civil investigation solely to obtain evidence for a subsequent criminal prosecution, in violation of due process. The Supreme Court in *Kordel* made it clear that dual investigations must meet the requirements of the Fifth Amendment Due Process Clause. *See* 397 U.S. at 11-12. While holding that "[i]t would stultify the enforcement of federal law" to curtail the government's discretion to conduct dual investigations strategically, the Court suggested that a defendant may be entitled to a remedy where "the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution." 397 U.S. at 11-12. In this case, the government argues that it did not violate defendants' due process rights because the civil investigation was not commenced solely to obtain evidence for a criminal prosecution.

It is significant to our analysis that the SEC began its civil investigation first and brought in the U.S. Attorney later. This tends to negate any likelihood that the government began the civil investigation in bad faith, as, for example, in order to obtain evidence for a criminal prosecution. In *United States v. Unruh,* 855 F.2d 1363, 1374 (9th Cir. 1987), we held that a defendant was not entitled to dismissal of his indictment when the U.S. Department of the Treasury instituted its investigation before any indictment and in order to file its own civil complaint. *See also United States v. Churchill,* 483 F.2d 268, 272 (1st Cir.

1973); *United States v. Teyibo*, 877 F. Supp. 846, 855 (S.D.N.Y. 1995).

United States v. Carriles, 486 F. Supp. 2d 599, 619-21 (W.D. Tex. 2007), on the other hand, is a clear example of government bad faith. The district court dismissed an indictment because the U.S. Citizenship and Immigration Services ("USCIS") interviewed the defendant solely to collect evidence in support of a criminal case against him. 486 F. Supp. 2d at 619-21. The defendant, a Cuban national, filed an application for naturalization. *Id.* at 601. Although USCIS had already determined that the defendant was not eligible for citizenship, the agency nonetheless invited him to a pre-citizenship interview in order to collect evidence for a criminal false statements case. *Id.* at 619. The interview protocol was altered in so many ways to serve the needs of the criminal investigation that it became an interrogation. The court described the "interview" as follows:

> (1) it lasted eight hours over the course of two days as opposed to the usual maximum of thirty minutes, (2) it involved two interviewers, (3) the [g]overnment provided an interpreter, (4) there were a total of four attorneys present – two defense attorneys and two Government attorneys, and (5) it was both audio and videotaped.

Id. Because the "entire interview was . . . a pretext for a criminal investigation," the district court dismissed the indictment. *Id.* at 629-20.

Our case is not remotely similar to *Carriles*. In this case the SEC's civil investigation was opened first, led to SEC sanctions and was conducted pursuant to the SEC's own civil enforcement jurisdiction. It was not a pretext for the USAO's criminal investigation of defendants. Congress has expressly authorized the SEC to share information with the Department of Justice to facilitate the investigation and prosecution of crimes. *See* 15 U.S.C. §§ 77t(b), 78u(d). We must conclude the SEC interviewed the defendants in support of a bona fide civil investigation. There was no violation of due process.

Defendant appellees finally contend that the district court properly concluded that dismissal or, in the alternative, suppression, was warranted because the government lulled the defendants into turning over incriminating evidence by engaging in "trickery and deceit." It was dispositive for the district court that the SEC staff attorney instructed court reporters to refrain from mentioning the AUSA's involvement and that the SEC gave evasive answers to questions about the imminence of a dual investigation. We have previously applied the Fourth Amendment's bar to unreasonable searches and seizures in the context of dual investigations by the civil and criminal branches of the IRS, where review of documentary evidence is inherent in the investigation. We have thus held that a search is unreasonable, even if consensual, if the consent is obtained by trickery or deceit. *See United States v. Robson*, 477 F.2d 13, 18 (9th Cir. 1973). While not every SEC and USAO dual investigation

will necessarily involve a search and seizure, to the extent that the individual defendants may have been led through trickery or deceit to turn over documentary or physical evidence in their possession or to use their official authority to turn over evidence in the possession of the corporation, the defendants could state a claim under the Fourth Amendment.

A government official must not "affirmatively mislead" the subject of parallel civil and criminal investigations "into believing that the investigation is exclusively civil in nature and will not lead to criminal charges." *Robson,* 477 F.2d at 18. However, "we have consistently held that the failure of an IRS agent . . . to warn a taxpayer that an audit may have potential criminal ramifications does not render the search unreasonable." *Id.* at 18-19 (denying suppression where an IRS agent did not expressly advise a taxpayer that the evidence the agent was gathering for a civil audit would be used to support a criminal investigation).

Other circuits have agreed that Fourth Amendment and possible due process limitations may be implicated in a dual investigation. *See United States v. Peters,* 153 F.3d 445, 451 (7th Cir. 1998) ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation."). Almost every other circuit has denied suppression, even when government agents did not disclose the possibility or existence of a criminal investigation, so long as

they made no affirmative misrepresentations. *See United States v. Irvine,* 699 F.2d 43, 46 (1st Cir. 1983); *United States v. Sclafani,* 265 F.2d 408, 414-415 (2d Cir. 1959); *United States v. Parenti,* 326 F.Supp. 717, 722 (E.D. Pa. 1971), *aff'd,* 470 F.2d 1175 (3rd Cir. 1971); *Groder v. United States,* 816 F.2d 139, 144 (4th Cir. 1987); *United States v. Prudden,* 424 F.2d 1021, 1030 (5th Cir. 1970); *United States v. Marra,* 481 F.2d 1196, 1203 (6th Cir. 1973); *United States v. Lehman,* 468 F.2d 93, 105 (7th Cir. 1972); *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993); *United States v. Kaatz,* 705 F.2d 1237, 1243 (10th Cir. 1983); *United States v. Wuagneux,* 683 F.2d 1343, 1347 (11th Cir. 1982); *United States v. Stamp,* 458 F.2d 759, 777 (D.C. Cir. 1971).

The district court in this case relied on the Eighth Circuit's opinion in *Grunewald,* which said it would be a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" a person into incriminating themselves in a criminal investigation being pursued under the guise of a civil one. 987 F.2d at 534. The Eighth Circuit was referring to the criminal defendant's argument that he was the victim of a criminal investigation being pursued in the guise of a civil tax audit. *Id.* The court rejected the argument and affirmed the district court's denial of suppression because there had been no deceit. *Id.* We applied virtually the same standard in *Robson,* where we held that suppression was not appropriate in the absence of affirmative misrepresentations. 477 F.2d at 17-18.

In this case, the SEC made no affirmative misrepresentations. The SEC did advise defendants of the possibility of criminal prosecution. The SEC engaged in no tricks to deceive defendants into believing that the investigation was exclusively civil in nature. The SEC's Form 1662 explicitly warned defendants that the civil investigation could lead to criminal charges against them: "Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission or any other agency." Defendants were represented by counsel, and the government provided counsel, so far as this record reflects, with accurate information. The standard we laid down in *Robson* was not violated.

The defendant-appellees point to a number of collateral facts they argue demonstrate trickery or deliberate misleading. They argue the SEC Staff Attorney affirmatively misled Stringer's attorney when, in response to the attorney's question about other agency involvement, she directed him to the provision in Form 1662 that warned that the SEC would likely turn over to the USAO evidence it collected at the depositions. The Staff Attorney, during the deposition taken in Portland, declined to direct defense counsel to a specific U.S. Attorney's Office, which would have been the Portland Office, but there was nothing false or misleading in her response that it was up to the defendant to decide where to direct his inquiries.

The defendant-appellees also point to the Staff Attorney's request to the court reporters not to mention the AUSA in the presence of defendants' attorneys. While this indicates an intent to prevent disclosure to defendants of the actual criminal investigation, the possibility of criminal investigation should have been well known to both the defendants and their counsel. The request to the court reporters to, in effect, mind their own business did not mislead or misinform defendants about the existence of an investigation. Thus, to the extent that the Fourth Amendment may have been implicated by the dual investigation, the district court erred in concluding that the government's actions in this case constituted an unreasonable search or seizure.

B. Interference with Samper's attorney-client relationship

The district court concluded that the government violated defendant Samper's due process rights when it obtained evidence about the "Swedish Drop Shipment" from Samper's attorney, knowing that she had a conflict of interest. *Stringer,* 408 F. Supp. 2d at 1092. The government argues that it did not deliberately intrude into Samper's attorney-client relationship because all that it did was receive information that Samper's attorney offered the government, wholly independent of any government conduct.

We have held that "government interference with a defendant's relationship with his attorney may

render counsel's assistance so ineffective as to violate . . . his Fifth Amendment right to due process of law." *United States v. Irwin,* 612 F.2d 1182, 1185 (9th Cir. 1980). "'[A] claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice.'" *United States v. Haynes,* 216 F.3d 789, 797 (9th Cir. 2000) (quoting *United States v. Voigt,* 89 F.3d 1050, 1067 (3d Cir. 1996)). A claim of government interference with the attorney-client relationship has three elements: (1) the government was objectively aware of an ongoing, personal attorney-client relationship; (2) the government deliberately intruded into that relationship; and (3), as a result, the defendant suffered actual and substantial prejudice. *Voigt,* 89 F.3d at 1067.

Most cases finding deliberate intrusion into the attorney-client relationship involve government informants who somehow penetrate the attorney-client relationship to obtain confidential or privileged information, and then feed that information to the government. *See, e.g., Haynes,* 216 F.3d at 793-94. In *Haynes,* the defendant's attorney's investigator served as a paid informant for the government. *Id.* at 792. In *United States v. Marshank,* 777 F. Supp. 1507, 1519-1520 (N.D. Cal. 1991), the defendant's attorney served as an unpaid informant for the government by providing the government confidential client information on a regular basis. In contrast, we have held that the government's asking a defendant's

former attorney to turn over privileged information does not constitute deliberate intrusion on the part of the government when the attorney complies. *See United States v. Rogers,* 751 F.2d 1074, 1080 (9th Cir. 1985). "The fact that the attorney failed to assert the ethical obligation does not transform [the government's] investigation into governmental misconduct." *Id.*

For similar reasons, there was no deliberate government interference here. The government did not deliberately intrude into the relationship between Samper and Rosenbaum when it accepted potentially incriminating evidence from Rosenbaum, nor was Rosenbaum a government informant whom the government sought out. *Cf. Haynes,* 216 F.3d at 793-94. In fact, in Form 1662, the government explicitly warned Samper that "[y]ou may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's." The conflict resulted from Rosenbaum's decision, wholly independent of the government, to represent FLIR and Samper. Samper had full knowledge of a potential conflict and consented to the representation. There was no impropriety on the government's part.

Indeed, had the government contacted Samper directly to warn him about the conflict, bypassing his attorney, the government would have engaged in conduct that itself may have amounted to interference.

Cf. Or. Rules of Prof'l Conduct R. 4.2; Model Rules of Prof'l Conduct R. 4.2. The government's receipt of evidence from counsel intended to assist one client, but that also tended to incriminate another, was not an intrusion or intentional interference with the attorney-client relationship and did not justify dismissal of the indictment or suppression of the evidence of the "Swedish Drop Shipment."

IV. Conclusion

For the foregoing reasons, we conclude that there was no deception or affirmative misconduct on the part of the government in the course of the SEC and U.S. Attorney investigations that warranted dismissal of the indictment or suppression of any of the evidence in question. In addition, defendants' Fifth Amendment rights were not violated.

The panel shall retain jurisdiction over any subsequent appeal in this matter.

The judgment of the district court dismissing the indictment is **VACATED**. The district court's suppression ruling is **REVERSED**. The case is **REMANDED** for further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. KENNETH STRINGER, *et al.*,

Defendants.

CR 03-432-HA

OPINION AND ORDER

HAGGERTY, Chief Judge:

On September 23, 2004, the grand jury issued a Third Superseding Indictment (hereinafter referred to as the Indictment) charging defendants J. Kenneth Stringer (Stringer), J. Mark Samper (Samper), and William N. Martin (Martin) with fifty counts of conspiracy and securities fraud. Defendants are former executives of FLIR Systems, Inc. (FLIR). The Indictment alleges that defendants acted in concert to inflate FLIR's revenues through a series of fraudulent revenue recognition and accounting practices in an attempt to defraud FLIR, its Board of Directors, its shareholders, its auditors, and the United States Securities and Exchange Commission (SEC).

Defendants filed separate Motions to Dismiss the Indictment, or in the Alternative, Suppress Testimony (Docs. #166, 182, 188). The court held eleven days of evidentiary hearings. Oral arguments were heard on November 15-16, 2005. The court rules on each motion in turn below.

Defendant Stringer and Martin's Motions to Dismiss/Suppress

Defendants Stringer and Martin seek to dismiss the Indictment, or, in the alternative, suppress the statements they made to the SEC because the information was produced in violation of their Fourth and Fifth Amendment rights. Specifically, defendants assert that had they been notified of the possibility of the criminal prosecution, they would have sought a stay of the civil proceedings, would not have produced any documents and Martin would not have provided a Wells Submission. Defendants seek dismissal of the Indictment or, alternatively, suppression of their statements made to the SEC in the prosecution's case-in-chief and for impeachment and rebuttal evidence, suppression of all documents provided to the SEC, vacation of the civil judgment entered into by Martin, invalidation of the consent decree, and suppression of Martin's Wells Submission.

The SEC began its investigation of defendants in mid-2000. Shortly thereafter, Assistant United States Attorney Charles Gorder (Gorder) met with Diana Tani, an officer with the SEC, and later requested access to the SEC's investigative files of defendants. Gorder indicated that he was making the request pursuant to ongoing investigation of defendants by the United States Attorney Office's (USAO) and the Federal Bureau of Investigation's (FBI). Gorder also indicated that defendants were the subjects of a Department of Justice investigation.

In August 2000 the SEC met with Assistant United States Attorney Kent Robinson (Robinson) for a preliminary discussion regarding the investigation of defendants. In October 2000 the SEC, the FBI and Robinson met again for an extensive discussion of the case. The SEC provided the USAO and the FBI with five notebooks of documents and a detailed memorandum setting forth the SEC's legal and factual analyses. At this meeting it was decided that the criminal investigation would abate in order to continue receiving statements from defendants and other witnesses through the civil investigation. In a memorandum memorializing the meeting, FBI Agent Boyer wrote:

> It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time so as not to jeopardize the opportunity to obtain statements from these individuals.

Stringer Ex. 59, Letter from Agent Boyer, FBI, to Kristine Olson, SEC, at 2 (October 20, 2000).

Ten days after meeting with the SEC and FBI, Robinson requested funding for a computer system for the FLIR investigation and stated that absent a "persuasive and complete explanation" the case "warrants prosecution." Stringer Ex. 101, Memorandum from Kent Robinson, to Judy Kobbervig, *et. al.*, USAO, at 2 (October 13, 2000). Robinson noted that the USAO would "benefit greatly" from the SEC's investigation and stated that the "probability of

prosecution is very high." *Id.* Robinson also identified Martin, Stringer and Samper as potential targets. Stringer Ex. 100, Handwritten Notes of Kent Robinson, at 3 (October 3, 2000).

In January 2001 the SEC investigators visited the FLIR facilities. Following the visit, the SEC, FBI and USAO met to discuss the progress of the investigation. In that meeting it was decided that the criminal investigators would continue to allow the civil investigators to handle the investigation. In a memorandum memorializing the meeting, FBI Agent Boyer stated that "AUSA Robinson advised that based on the level of cooperation that the new FLIR management team has extended to the SEC, no overt investigation will be conducted by the FBI at this time." Stringer Ex. 62, Memorandum from Agent Boyer, FBI, to Gordon Compton, FBI, at 3 (February 5, 2001).

The USAO continued to rely on the work product generated by the SEC investigators. Robinson explained that FLIR was cooperating and so "a decision was made not to pursue a parallel grand jury investigation" but to "passively observe[ ] the results of the SEC's work." Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001). Robinson noted this strategy had "provided good investigative results, at little cost to us" and that the "SEC's investigation continues to suggest that this case will produce a criminal prosecution." *Id.* Robinson also reiterated that the investigation continued to implicate Stringer and Samper. *Id.*

The civil and criminal investigators communicated regularly throughout the civil investigation, exchanging information and discussing strategy. Robinson advised the SEC that he was interested in false testimony cases and explained how to create the best record possible for such cases. Stringer Ex. 66, E-mail from Lorraine Echavarria, SEC, to Diana Tani, *et. al.*, SEC, at 1 (April 5, 2001). The SEC forwarded this information to "all testimony takers so that we will know and understand what Kent needs/wants to prosecute a false testimony case." *Id.* The SEC also agreed to conduct certain interviews in Oregon to provide potential jurisdiction for the Oregon USAO, despite the inconvenience to the SEC investigation.

Robinson identified to the SEC that Samper and Stringer were targets. *Id.* The SEC expressed a desire to "convince him to expand" targets beyond Samper and Stringer. *Id.* A few months later the USAO and FBI traveled to Los Angeles to meet with the SEC and maintained that Samper, Stringer, Martin and two others were targets of the investigation. Stringer Ex. 71, Memorandum from Agent Compton, FBI, to Agent Boyer, FBI, at 2 (July 5, 2001).

In June 2001 SEC attorney Lorraine Echavarria (Echavarria) and Assistant United States Attorney Allan Garten (Garten) discussed the criminal investigation and decided to wait before commencing parallel proceedings, noting that with such proceedings the SEC action would be stayed and that defendants and FLIR would most likely settle unless the USAO was involved. Stringer Ex. 69, Handwritten Notes of

Echavarria, at 3 (June 6, 2001) (hereinafter Stringer Ex. 69). In December 2001, the SEC and USAO decided it was still "premature to surface," and that the presence of the USAO would "impede" a scheduled meeting with FLIR. Stringer Ex. 75, Handwritten Notes of Diana Tani, at 1 (December 19, 2001).

The civil investigators were aware of the need to suppress the presence of the USAO. Echavarria noted to "make sure court reporters won't tell [FLIR's attorney] about Kent." Stringer Ex. 60, Handwritten Note of Echavarria. Echavarria also wrote to Assistant United States Attorney Allan Garten (Garten), requesting he stay away from SEC interviews because FLIR's attorney would be present and noting "[i]f you plan to surface to company [FLIR] counsel soon, that is a decision we would like to discuss with you prior to you making it." Stringer Ex. 70, E-mail from Echavarria, SEC, to Garten, USAO, at 1 (July 3, 2001). Echavarria and Garten discussed the strategy for the case and decided that the USAO would "surface end of Jan/early Feb [2003]" and with "no notice." Stringer Ex. 94, Handwritten Note of Echavarria (December 20, 2002).

Defendants were subpoenaed to testify before the SEC and were informed that disclosure of information to the SEC is mandatory, subject to the valid assertion of any legal right or privilege. The subpoenas also stated that failure to provide information could result in a court order compelling such information followed by criminal sanctions. Defendants were given the standard SEC Form 1622, which is given to

all testifying witnesses. This form informs witnesses of their right to counsel, their Fifth Amendment rights, and the routine uses of information. The "routine uses" listed included a proviso that the SEC often makes its files available to other governmental agencies, particularly the USAO. Form 1662 also noted that any information given to the SEC may be used in any federal criminal proceeding.

Defendants assert that their due process rights were violated because they were not advised that the prosecutor and the FBI were using the SEC to gather evidence for a criminal prosecution. They argue that this prejudiced them because their Fifth Amendment right not to be compelled to testify was removed; they lost the opportunity to seek immunity from, or to cooperate with the prosecution; they were unable to seek a stay of the proceedings; the prosecutor and the FBI were granted more discovery than they would have been entitled to under the Federal Rules of Criminal Procedure; and Martin provided to the prosecution through the Wells Submission any and all defenses he may have had to the subsequent criminal charges.

Stringer testified before the SEC on October 29, 2001. He asserts that neither he, nor his attorney, was aware that the prosecution was contemplating criminal charges against him. In a dialogue with Echavarria, Stringer's attorney asked the following questions and received the following responses:

STRINGER'S ATTORNEY: My first question is whether Mr. Stringer is the target of any aspect of the investigation being conducted by the SEC.

ECHAVARRIA: The SEC does not have targets in this investigation.

STRINGER'S ATTORNEY: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.

ECHAVARRIA: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.

STRINGER'S ATTORNEY: And which U.S. Attorney's office might I inquire into?

ECHAVARRIA: That would be a matter up to your discretion.

Defendant Stringer's Memorandum in Support of Motion to Dismiss, Ex. 8.

Defendants argue that the SEC and USAO worked together on a single investigation, with the USAO hiding behind the SEC to sidestep defendants' constitutional rights that they would have otherwise

asserted in the criminal proceeding, and build up its criminal case against them.

The prosecution argues that the USAO and the SEC were conducting parallel proceedings, which is an acceptable approach for civil and criminal authorities investigating the same matter. *See United States v. Kordel,* 397 U.S. 1, 11 (1970); *Securities and Exchange Comm'n v. Dresser Indust.,* 628 F.2d 1368 (D.C. Cir. 1980). The prosecution also argues that defendants were provided with adequate notice that their statements could be used in a criminal prosecution through Form 1662.

The court concludes that these were not parallel investigations. The USAO identified potential criminal liability and a few targets in the beginning of the investigation, and elected to gather information through the SEC instead of conducting its own investigation. The government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked. Stringer Ex. 69, at 3 (June 6, 2001) (memorializing a telephone conversation between Echavarria and Garten wherein Garten explains that once there is an indictment "discovery is over. Criminal is totally 1 sided" and that he would then give everything and get nothing). The government was aware that there was no parallel proceeding. *See* Stringer Ex. 78, Draft E-mail from Diana Tani to Laurie Stegman (noting that Garten wanted

to see what the SEC put together "rather than running his own parallel criminal investigation"); Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001) (stating that a decision was made "not to pursue a parallel grand jury investigation").

The delay by the USAO was not for the purpose of reviewing evidence gathered by the SEC to make an informed decision as to whether the case warranted prosecution. From the beginning, the USAO consistently held the position that a criminal prosecution was likely. Almost a year after the SEC investigation began and two years before the USAO made its presence known, the USAO reiterated its position that the case would most likely warrant criminal prosecution, yet decided not to conduct a parallel criminal investigation. Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001). Moreover, the USAO was actively involved in the SEC investigation: meeting regularly, receiving documents, requesting interviews be conducted in Oregon to establish jurisdiction, advising what information was needed for a successful criminal prosecution, specifically instructing on how best to conduct interviews to gather evidence for false statement cases, intentionally hiding its presence from FLIR's attorneys, and repeatedly planning with the SEC as to when it would be best to surface and conduct an overt criminal investigation.

The strategy to conceal the criminal investigation from defendants was an abuse of the investigative

process. In *Kordel,* the Court found there was no abuse in using the civil discovery process to obtain evidence later used in a criminal proceeding because the case was not one in which the government "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." This case clearly falls within the scenario contemplated by the Supreme Court as a "violation of due process or a departure from proper standards in the administration of justice." *Kordel,* 397 U.S. at 11. In this case, the government did not advise defendants that it anticipated their criminal prosecution. Moreover, the USAO intentionally shielded its intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement.

Defendants had been identified consistently as "targets" or "subjects," and yet the government failed to alert them to the possibility of criminal exposure beyond presenting the standard form that is given to every individual, whether or not a target, prior to testifying. In light of the active role of the USAO in the SEC investigation, this warning was insufficient. *See, e.g., United States v. Thayer,* 214 F. Supp. 929, 933 (D. Colo. 1963) (noting that "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of the Government and did not receive an explanation of the true import of the [ ] inquiry").

In addition, it is a due process violation if government agents make affirmative misrepresentations as to the nature or existence of parallel proceedings or otherwise use trickery or deceit. *United States v. Robson,* 477 F.2d 13, 18 (9th Cir. 1973). Echavarria's response to the direct inquiry by Stringer's attorney as to the existence of a criminal investigation was evasive and misleading, particularly in light of the close association between the USAO and the SEC throughout the investigation and the early identification of Stringer as a criminal target.

A government agency may not develop a criminal investigation under the auspices of a civil investigation. *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993). It would be a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" someone into incriminating themselves in the civil context when "activities of an obvious criminal nature are under investigation." *Id.* (referencing a civil tax audit versus a criminal tax investigation). Here, defendants were identified as subjects of a criminal investigation. The government's tactic to move forward under the guise of a civil investigation, violated defendants' due process rights. *Robson,* 477 F.2d at 18 (finding that the government can not "affirmatively mislead the taxpayer into believing that the investigation is exclusively civil in nature and will not lead to criminal charges"). The USAO confirmed its commitment to a criminal case, but emphasized to the SEC that it would "need to be spoonfed" the evidence from the civil investigation.

Stringer Ex. 73, E-mail from Garten, USAO to Echavarria, SEC (November 6, 2001).

Assuming, *arguendo,* that these were parallel proceedings, dismissal of the indictment or suppression of voluntary testimony given in a parallel civil proceeding is warranted if the government engaged in deceit, trickery, or intentional misrepresentation. *United States v. Tweel,* 550 F.2d 297, 300 (5th Cir. 1977). Here, the government engaged in deceit and trickery to keep the criminal investigation concealed. The government went so far as to instruct court reporters to refrain from mentioning the U.S. Attorney's involvement and to have Garten avoid being near certain interviews for fear his presence would cause the criminal investigation to surface. Moreover, Echavarria misled Stringer and his attorney into believing he was not a target and evaded the question about the USAO's involvement.

Dismissal of an indictment is warranted if the alleged governmental misconduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir. 1991); *United States v. Ramirez,* 710 F.2d 535, 539 (9th Cir. 1983). The conduct involved in this case meets that standard. The USAO spent years hiding behind the civil investigation to obtain evidence, avoid criminal discovery rules, and avoid constitutional protections. In *United States v. Rand,* the court dismissed the indictment, finding that the government had "engaged in an obnoxious form of using parallel proceedings." 308 F.Supp. 1231,

1234 (N.D. Ohio 1970). The government "may not bring a parallel civil proceeding and avail itself of the civil discovery devices to obtain evidence for subsequent criminal prosecution." *United States v. Parrott,* 248 F.Supp. 196, 202 (D.D.C. 1965). The facts in this case are more egregious, as it cannot credibly be claimed that these were parallel proceedings.

Moreover, defendants Fifth Amendment rights were violated. As defendants were unaware of the involvement of the USAO, it is "unrealistic to suppose that defendant[s] [would] be on guard against incriminating [themselves]." *Rand,* 308 F.Supp. at 1237. As such, "it is unfair in the extreme to penalize defendant[s] for failure to invoke [their] privilege against self-incrimination." *Id.*

In view of these findings, to "simply suppress the evidence which the government obtained by the methods explored above would not be sufficient to remedy the violation of defendant[s] constitutional rights." *Id.* at 1238. Accordingly, the indictments are dismissed.

Defendants' statements to the SEC were gathered in violation of defendants' due process and Fifth Amendment rights. *Kordel,* 397 U.S. at 12; *Robson,* 477 F.2d at 18. In the event the Ninth Circuit Court of Appeals determines that dismissal of the indictment is in error, for the foregoing reasons, the statements and the evidence obtained from those statements are suppressed.

Defendant Samper's Motion to Dismiss/Suppress

Samper seeks dismissal of the Indictment for violations of his Fifth Amendment Due Process rights, or, alternatively, suppression of all evidence obtained as a result of the violation. Samper joins in the arguments of Martin and Stringer discussed above, and also raises the claim that the government took unfair advantage of Stoel Rives' conflict of interest while pressing for a criminal prosecution.

Samper, former Chief Financial Officer of FLIR, tendered his resignation in February 2000 in the midst of FLIR's public announcements of accounting errors and fallen earnings. Shortly thereafter, the SEC began investigating FLIR and several employees, including Samper. In March 2000, Lois Rosenbaum (Rosenbaum) of Stoel Rives offered to undertake joint representation of Samper, Stringer, and FLIR. Samper indicated that he had already retained independent counsel, but on May 15, 2000, Samper consented to joint representation. On June 30, 2000, Samper was subpoenaed to testify before the SEC.

In July 2000, Echavarria wrote a letter to Rosenbaum, indicating that she was concerned that Stoel Rives was still representing FLIR and several FLIR employees, including Samper:

> Although it is far too early in the investigation of the SEC staff to identify people who may possess liability, we are troubled by the scope of [Stoel Rives'] representation. We

> urge you to stringently evaluate and assess your conflicts prior to continuing with this method of representation. Further, we hope that the possibility of conflicts has been sufficiently explained to all of your putative clients.

Government's Opposition to Defendant Samper's Motion to Dismiss (Govt.'s Opp. to Def. Samper's Mot. to Dismiss), Ex. 20. Rosenbaum responded that she was aware of her ethical obligations and would act accordingly.

Upon advice of Stoel Rives counsel to fully cooperate with the government to avoid liability, Samper testified before the SEC on October 19, 26, and 27, 2000, and later disclosed all FLIR documents in his possession. A second round of interviews was conducted in October and November 2001. At the hearings, Samper was provided the standard SEC Form 1662, which outlined the rights of witnesses and the "routine uses" that the SEC makes of information provided.

The SEC also interviewed several other FLIR employees, many of whom were represented by Stoel Rives and provided either directly incriminating testimony against Samper or provided testimony contrary to Samper's.

On March 8, 2002, FLIR submitted a Wells Submission and stated that civil enforcement proceedings were unnecessary because FLIR had terminated Samper, one of the key employees who had

brought FLIR into the financial quandary: "FLIR does not contest that significant accounting errors were made in the 1998 and 1999 fiscal years. However, the problems that existed in those years are the problem of a company that no longer exists. . . . The individuals who were responsible for the accounting errors have been terminated, and the Company is under new executive and financial management." Defendant Samper's Memorandum in Support of Motion to Dismiss (Def. Samper's Mem. in Supp. of Mot. to Dismiss), Ex. 36, at 1, 6. Shortly thereafter, FLIR entered into a settlement agreement with the SEC wherein they agreed to not violate securities laws in the future. The SEC filed its Complaint against Samper in September 2002.

Samper claims that during the course of negotiating a settlement with the SEC, he asked Echavarria whether a criminal prosecution would follow. Samper asserts that Echavarria misled Samper and deliberately concealed from him the fact that the USAO had already accepted SEC's referral of a criminal prosecution and was actively involved in the investigation.

In January 2003, the prosecutor met with Rosenbaum, wherein she assured the prosecutor that FLIR intended to cooperate in the criminal investigation. *Id.*, Ex. 41. On March 5, 2003, Ms. Rosenbaum sent Samper a letter stating that the Department of Justice had informed her that it was investigating Samper and other FLIR employees. *Id.*, Ex. 42. She indicated that Stoel Rives would continue to act as FLIR's counsel, with Samper's permission, but would

no longer represent individuals, including Samper. *Id.* On April 11, 2003, Samper agreed to have Stoel Rives continue as FLIR's counsel, with the proviso that Stoel Rives would not disclose Samper's "secrets and confidences [or] affirmatively assist the DOJ in developing its case." Def. Samper's Mem. in Supp. of Mot. to Dismiss, Ex. 43. Samper argues that Stoel Rives, through Ms. Rosenbaum, continued to represent FLIR and several FLIR employees who continued to provide useful information to the SEC and the prosecutor in the corresponding civil and criminal proceedings. Def. Samper's Mem. in Supp. of Mot. to Dismiss, Ex. 44.

Samper argues that, as a result, the SEC and the prosecutor continued to exploit what they knew to be a blatant conflict of interest in having Samper's former attorney assist the prosecution in building its criminal case against him. Specifically, Samper argues that the government interfered with Samper's relationship with Rosenbaum by: exploiting Stoel Rives' conflict of interest in representing both FLIR and Samper; failing to advise Samper of facts that would have revealed the conflict of interest; failing to obtain a court order removing Stoel Rives as Samper's counsel; misleading Samper as to whether a criminal investigation had been initiated; using Stoel Rives to gather incriminating evidence against Samper; and depriving Samper of zealous representation and conflict-free advice.

Government interference with a defendant's relationship with his attorney may render the

counsel's assistance so ineffective as to violate the defendant's Fifth Amendment right to due process of law. *United States v. Irwin,* 612 F.2d 1182, 1185 (9th Cir. 1980). However, not all government action that could arguably be called an interference is unlawful. *Id.* "[T]he right is only violated when the intrusion substantially prejudices the defendant," such as using evidence gained through the interference against the defendant at trial, using confidential information pertaining to the defense plans and strategy, causing the defendant to lose confidence in his or her attorney, and other actions intended to give the prosecution an unfair advantage at trial. *Id.* at 1187 (referencing the Sixth Amendment right to counsel, which differs from the Fifth Amendment in that it is triggered once an indictment is issued). When an apparent conflict of interest between the defendant and defense counsel comes to the attention of the government, the government is under an obligation to bring the issue to the trial court's attention and, if necessary, move for disqualification of counsel. *United States v. Tatum,* 943 F.2d 370, 379-80 (4th Cir. 1991).

As discussed above, the SEC was aware that a criminal prosecution would most likely occur, and was actively involved in obtaining evidence for the purposes of criminal prosecution. The government was the only party involved who knew the degree of the conflict of interest in having Rosenbaum represent Samper, FLIR and the other witnesses. Rosenbaum and Samper were not aware of the involvement of the USAO and the intended criminal prosecution. Under

these circumstances, the government should have moved for disqualification of counsel. *Id.*; *Securities Exchange Comm'n v. Higashi,* 359 F.2d 550, 553 (9th Cir. 1966) (noting that multiple representation is allowed only when there is no conflict of interest); *Kentucky West Virginia Gas Co. v. Pennsylvania P.U.C.* 837 F.2d 600, 618 (3rd Cir. 1988) (discussing *Higashi* and finding that ordering parties to retain separate counsel when there is a conflict of interest does not violate due process or the Administrative Procedures Act).

In this case, the government took advantage of counsel's conflict of interest and obtained information it might not have otherwise received. After the SEC filed its Complaint, Rosenbaum telephoned the SEC and expressed surprise that the Swedish drop shipment was not identified as a fraudulent transaction. Samper had described the transaction to Rosenbaum, and Rosenbaum, in turn, identified the transaction and provided the supporting documents to the SEC. This charge was then included in the Indictment. Rosenbaum's desire to cooperate with the government on behalf of FLIR resulted in additional charges against her other client, Samper. The evidence relating to the Swedish drop shipment was improperly obtained by the government. *Irwin,* 612 F.2d at 1187.

For the reasons discussed above in the Stringer and Martin motions, the egregious behavior of the government warrants dismissal of the indictment against Samper. In the event the Ninth Circuit Court of Appeals finds dismissal of the indictment to be in

error, suppression of the SEC statements and the evidence obtained from those statements is warranted. Additionally, in light of the particularized harm to Samper by the government's improper behavior regarding Rosenbaum's conflict of interest, the evidence relating to the Swedish drop shipment and anything derived from that evidence is also suppressed. Charges related to the Swedish drop shipment are also stricken from the Indictment.

CONCLUSION

Defendant Stringer's Motion to Dismiss the Indictment (Doc. #182-1) is GRANTED. Defendant Stringer's Motion to Suppress SEC Interview Statements (Doc. #182-2) is GRANTED. Defendant Stringer's SEC interview statements and any evidence derived from those statements are suppressed. Defendant Martin's Motion to Dismiss the Indictment (Doc. #166-1) is GRANTED. Defendant Martin's Motion to Suppress Statements and Documents (Doc #166-2) is GRANTED. Defendant Martin's SEC interview statements and any evidence derived from those statements are suppressed. Defendant Samper's Motion to Dismiss the Indictment for Violation of Due Process (Doc. #188-1) is GRANTED. Defendant Samper's Motion to Suppress Evidence (Doc. #188-2) is GRANTED. Defendant Samper's SEC interview statements and any evidence derived from those statements are suppressed. Additionally, the evidence related to the Swedish drop shipment is

suppressed and any reference to the Swedish drop shipment in the Indictment is hereby STRICKEN.

IT IS SO ORDERED.

Dated this 9 day of January, 2006.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge